Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

Respondent-Libellant.

—against—

Steamtug "LACKAWANNA", MARGARET A. JAMISON and MARTHA A. JAMISON, co-partners doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Petitioners.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals was filed on May 12, 1941 and appears in this record (R., pp. 137-139). It is reported at 119 F. (2d) 666.

The opinion of the District Court was filed on May 23, 1939, but is not officially reported. Its findings of fact and conclusions of law are contained in the opinion (R., pp. 120-128).

Jurisdiction.

The facts are fully stated in the petition. This is a suit within the Admiralty and Maritime jurisdiction of

the United States and of this Honorable Court. Jurisdiction of this court is invoked under Article 3, Section 2, of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Title 28, Chapter 9, Section 347, U. S. Code).

Specification of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following respect:

In that the Circuit Court of Appeals modified the decision of the District Court by holding the tug "Lackawanna" solely liable for the damage sustained by the tug "S. & H. No. 2", and erred in holding that the tug "S. & H. No. 2", as an overtaken vessel, was not required to maintain a lookout at any time while making a radical change of course.

Argument.

No requirement is more rigidly enforced in admiralty courts than that a vessel must at all times maintain a proper lookout. This court in the case of *The Ariadne*, 80 U. S. 475, at 478-479, has thus stated the rule:

> "The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveller threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property

and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In *The New York*, 175 U. S. 187, at 204, this court in commenting on the failure of the officers of a ship to observe another vessel, said:

> "Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout."

In the present case it is admitted that neither the stern lookout nor the pilot at the wheel of "S. & H. No. 2" saw the "Lackawanna" until she was within 300 feet, although the vessels just before the collision were approaching each other almost head on.

Not only has this Court held that a proper lookout must be maintained at all times by all vessels, but it has specifically applied this rule to the case of an overtaken

vessel. See passage quoted from *The Illinois*, 103 U. S. 298 (*supra*, p. 5).

That the change of course of "S. & H. No. 2" was material cannot be doubted since she had changed from a course going directly upstream to one in which she was going slightly downstream. Under the decision of this Court in the case of *The Illinois* those on board "S. & H. No. 2", before she made such a radical change in her course, should certainly have made "such an observation in all directions" as would enable her to know that what she was about to do would not have any dangerous effects on herself or on other vessels navigating in her vicinity.

Not only has this Court required the overtaken vessel to take the precaution, dictated by plain common sense, of looking all around before making any radical change of course to either side, but the Circuit Courts of Appeal in other Circuits have held the overtaken vessel to a similar eminently sensible requirement.

The Circuit Court of Appeals for the Sixth Circuit in the case of *Robinson* v. *Detroit & C. Steam Nav. Co.*, 73 Fed. 883, held in an overtaking situation that the overtaken tug was at fault for making a change of course to starboard without looking astern before making her change of course. It said at page 892:

> "* * * and it is probable that if she had had a lookout, whose only duty it would have been to look up and down the river, to observe whether the passage across the river was free, he would have seen the lights of the 'Mackinaw', and the collision would have been avoided.
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> * * *
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> Before the execution of such a maneuver as the tug proposed to carry out, it would have been the duty of a lookout upon the tug to look up and down the river in the usual path of vessels at that point."

In the case of *Larsen et al.* v. *Portland California S. S. Co. et al.*, 66 F. (2d) 326 at 330, the Circuit Court of Appeals for the Ninth Circuit affirmed a decision of the lower court holding the "Orient", the overtaken vessel, solely at fault in a collision with the "Admiral Nulton", the overtaking vessel, in which the "Orient" made a radical change of course of 90° to the left, liability of the overtaken vessel arising

> "because of the fault of the 'Orient' in making a sudden, unexpected and unnecessary change of course to the left without observing the approach of the 'Admiral Nulton', without warning and without posting a lookout who could observe whether such a change could be safely made."

In the foregoing cases the overtaken vessel was held to the reasonable requirement *before* making a change of course across the path of any vessels coming toward her, of looking astern to see that any such change of course would not imperil herself or any vessel coming toward her. In the case at bar, however, not only did the Circuit Court of Appeals for the Second Circuit hold that the overtaken vessel was not required to look around *before* making the radical change of course which she did, but it held still further that the overtaken vessel was not bound to maintain a lookout at any time thereafter, even though the vessel proceeded for a distance of some 400 feet across such a normally crowded thoroughfare as the East River, and directly across the courses of any vessels coming up or going down the river. The court also absolved the overtaken vessel from any duty of looking ahead, although, she was making a change of course of more than 90°.

The Circuit Court of Appeals for the Second Circuit stands alone in thus granting to an overtaken vessel the right to change her course, no matter how radically, not

only without being required to look astern before making such a change of course, but without looking around at any time thereafter, no matter what the new heading of the overtaken vessel may be.

Not even in this Circuit have other privileged vessels been granted any such right. Thus, in its decision in the case of *The Salutation*, 79 F. (2d) 609, the Circuit Court of Appeals for the Second Circuit held the privileged vessel in a crossing situation at fault for failing to maintain a proper lookout. The fact that the tug "Salutation", which was the privileged vessel in that case, was also proceeding across the same East River, which the court very properly described as "crowded waters", in which the tug while proceeding across the river "might encounter upbound vessels not then visible", was an added reason for holding the privileged vessel at fault for not maintaining a proper lookout.

In the case of *The Salutation* the court also invoked the principle laid down by the same court in the case of *The Madison*, 250 Fed. 850, that the failure to maintain a proper lookout was equivalent to the violation of the provisions of a statute, thereby putting upon the offender the burden of establishing not only that the violation did not, but that it could not have contributed to the collision. *The Pennsylvania*, 19 Wall. 125, 137, 138. The fact that the tug "Salutation" was the privileged vessel was not deemed sufficient in the court's opinion to discharge her from the duty of maintaining a proper lookout downstream as she proceeded across the river, nor was it sufficient to relieve her from the burden of establishing that her failure to maintain a proper lookout not only did not, but could not have contributed to the collision.

It is only in the case of an overtaken vessel that the Circuit Court of Appeals for the Second Circuit has thus relieved the privileged vessel from the duty not only of keeping her course and speed, but also from the duty of

maintaining a proper lookout; and this rule has only prevailed in recent years.

In its earlier decisions, *e. g.*, in *Long Island R. R. Co.* v. *Killien*, 67 Fed. 365, and *The New York Central No. 28*, 258 Fed. 553, the Circuit Court of Appeals for the Second Circuit applied the general rule that the overtaken vessel must hold her course and speed. In both of the cases cited the overtaken vessel was held at fault for making a change of course.

Thereafter, in the cases of *The Merrill C. Hart*, 188 F. 49, and *The M. J. Rudolph*, 292 Fed. 740, the same court held that the overtaken vessel was not only privileged to make any change of course, no matter how abrupt, but that she could do so without being required to look astern.

In the case of *The Transfer No. 8*, 25 F. (2d) 628, the court reverted to its earlier rule and held that even in an overtaking situation the overtaken vessel is not justified in changing her course without looking astern to see that such change of course would not be dangerous.

In the case of *The Industry*, 29 F. (2d) 29, the attention of the Court was called specifically to the fact that since under Article 24 (33 U. S. C. A. Sec. 209) the overtaking vessel was required to keep out of the way of the overtaken vessel, then under Article 21 (33 U. S. C. A. Sec. 206) the overtaken vessel was under the duty of keeping her course and speed and that under Rule VIII of Article 18 (33 U. S. C. A. §203) she was forbidden to cross the bow of the overtaking vessel. The decision of the court with respect to these clear statutory provisions was that they did not come into operation or have any binding effect on the overtaken vessel until after an exchange of signals, such as provided for under Rule VIII, had taken place. Under the court's interpretation of the rules, the overtaken vessel is under no obligations until after a whistle exchange has

taken place; but prior to such exchange she has, nevertheless, all of the privileges accorded by the rules. In other words, before the whistle exchange she has all the privileges and none of the burdens of an overtaken vessel.

Since an exchange of signals under Rule VIII is required only in case the vessel astern "shall desire to pass" the vessel ahead, it would follow that if the vessel astern did not desire to pass and for that reason sounded no whistles, then under the decision of the Court in the *Industry* the vessel ahead would have the right to change her course or speed without looking astern and would not be held to any duty whatever with respect to the vessel astern, as the Court described it (pp. 30-31):

> "while it remains possible for the overtaking vessel by proper navigation to accommodate herself to a change in course or speed of the vessel ahead."

But if the overtaken vessel does not maintain a lookout, how can she determine when the point is reached at which the overtaking vessel can no longer avoid collision unaided?

This same question is presented by the decision in the present case, which was as follows (R., p. 139):

> "The 'S. & H. No. 2' had the right to rely on her privilege and was not bound to look behind her or to take any steps to avoid a collision by the 'Lackawanna' unless, after seeing the latter, it became apparent that without precautions on the part of the 'S. & H. No. 2' a collision could not be avoided."

The Court, however, also held (R., p. 138):

> "The 'S. & H. No. 2' did not notice the approach of the 'Lackawanna' until it was too late to avoid a collision between the libellants' tug and the carfloat unless the 'Lackawanna' was under sufficient control to keep out of the way."

Since the "S. & H. No. 2", because of her failure to maintain a lookout, did not notice the approach of the "Lackawanna", she was, of course, unable to determine whether the "Lackawanna" was under sufficient control to keep out of the way or at just what time the need for taking action by the "S. & H. No. 2" first arose.

Although certiorari was applied for in the case of the *Industry*, this Court denied the application (279 U. S. 837).

Following its decision in the case of the *Industry*, the Circuit Court of Appeals for the Second Circuit has from time to time added still further to the privileges granted to the overtaken vessel by holding not only that she is not required to keep her course, but also that she is not required to keep her speed. This decision was made in the case of *The Holly Park*, 39 F. (2d) 572, in which the court also reaffirmed its previous decisions that the overtaken vessel was not required to look astern before making any change of course.

CONCLUSION.

We, therefore, submit that the decision of the Circuit Court of Appeals should be reviewed because of the conflict between this decision and the principles laid down in the decisions of other circuits, and of this Court, and because of the importance of establishing uniformity in the interpretation of the Federal statutes regulating the rights and duties of vessels in overtaking situations.

Respectfully submitted,

OSCAR R. HOUSTON,
Proctor for Petitioners.